No. 13669.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. W. SHEPHERD and NORMA D. SHEPHERD, co-partners, doing business as Shepherd Tractor & Equipment Co.,

Appellants,

vs.

CONSTRUCTORS, S. A., a corporation,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of the Case.

Appellants' statement of facts is substantially correct except in the following respect:

That pursuant to appellants' instructions to the Sheriff of Los Angeles County to garnishee Julio A. Villaseñor's personal property in the possession of Belyea Truck Company, the said Sheriff did serve said writ of garnishment on the said Belyea Truck Company. [Tr. pp. 17; 12 and 13.]

ARGUMENT.

I.

Comment on Appellants' Argument.

Appellants contend that the trial Court erred in the following matters:

> "1. The adjudication by the State court of appellee's right of possession to and ownership of motor grader was void for lack of jurisdiction." (App. Op. Br. pp. 3 and 4.)

(a) Contrary to appellants' argument Exhibit 1 was received into evidence as *appellee's* Exhibit 1, and appellants' objection to its introduction on the ground that it appeared on the face of the pleading that the court had no jurisdiction is both contrary to the facts and to the law in this case. [Tr. pp. 36 and 37.]

(b) In essence appellants' contention of lack of jurisdiction by the State Court to try the Third Party Claim is based on the fact that the Sheriff did not have physical possession, or received manual delivery of the said motor grader, and hence appellants contend that there was no valid levy of the writ of garnishment. Appellants cite the case of *Bank of America v. Riggs,* 39 Cal. App. 2d 679, in support of their contention. That case does not apply to the facts of the case at bar; since the property garnished in the cited case consisted of corporate securities, stocks or credits. Furthermore in the cited case, at page 683 the court quotes the case of *First National Bank v. Kinslow,* 8 Cal. 2d 339, 67 P. 2d 796, as follows: "The right to the possession of the property levied at the time of the levy is therefore the only question put in issue by the filing of

the Third Party Claim"; and therefore appellants' contention that the State Court had no jurisdiction to try the issue of title and possession due to an invalid levy, is contrary to the rule expressed in this case and has no merit.

(c) The case of *First National Bank v. Kinslow, supra,* cited by appellants, concerns the liability of the levying officer in levying a writ of execution. This cited case goes to the liability and duties of the levying officer and does not touch on the question of the liability of the party causing an attachment or garnishment upon an innocent third party.

The cited case applies only to an execution on real property and not on personal property as in the case at bar.

(d) In *Thompson v. Cook,* 20 Cal. 2d 564, cited by appellants, the question presented there was the right of defendant to set aside a default judgment which had been rendered without notice to the defendant. It will be noted that in the case at issue there was no default, all parties were present in court to present any objection to the State Court's jurisdiction in determining title and possession of the motor grader. [Tr. pp. 27 and 28.] Further, it will be noted that the Third Party action was set for trial and hearing at the express request of the appellants herein. [See App. Op. Br., pp. 2 and 3; Clk. Tr. p. 18.] Therefore, the appellants invoked the jurisdiction of the State Court to try the issue of the Third Party Claim, to determine title and right of possession of the motor grader in question. The appellants should now be estopped from raising the question of lack of jurisdiction of the State Court. One who has invoked exercise of jurisdiction within general powers of court cannot seek to reverse its orders upon ground of lack of jurisdiction. (*Cal. Code*

Civ. Proc., Sec. 1962, Sub. 3; Sec. 1963, Sub. 16; *Hensgen v. Silberman,* 87 Cal. App. 2d 668, at 673.) The Court, in discussing the Doctrine of Estoppel as applicable to the question of jurisdiction, stated as follows:

> "The California doctrine is based upon subdivision 3 of 1962 of the Code of Civil Procedure, which prohibits a party from denying an act which he has deliberately led another to believe and act upon as true. Though ignorance of the truth is a primary essential on the part of one pleading an estoppel *in pais,* our courts have recognized another species of estoppel, called 'quasi estoppel' which is based upon the principle that one cannot blow both hot and cold, or that one 'with full knowlege of the facts shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another' . . ."

Plaintiff, after replying to answer and submitting to trial on the merits, could not question the court's jurisdictio to entertain counterclaims. (*Cooling Tower Co. v. V. V. Braun & Co.,* 1 F. 2d 178.)

A Superior Court of general jurisdiction, acting within the general scope of its power, is presumed to act rightly, and this presumption embraces jurisdiction, not only of the cause or subject matter of the action in which the judgment is given, but of the parties also. (*Cabin v. Page,* 85 U. S. 350.)

The rule is that the Superior Court, as a court of record and general jurisdiction is presumed to have jurisdiction over a particular cause. It is not necessary to plead affirmatively the facts showing jurisdiction, and lack

of jurisdiction must be affirmatively shown. (*Cal. Code Civ. Proc.,* Sec. 1963, Sub. 16; *Chency v. Trauzettel,* 9 Cal. 2d 158. 160.)

Appellants did not raise the question of lack of jurisdiction in their pleadings or at the time of trial in the State Court. Appellants did not make any motion to set aside the judgment of the State Court as provided for in Code of Civil Procedure Section 473. And lastly, appellants did not avail themselves of the right of appeal from said judgment. Appellants should be estopped from raising the question of lack of jurisdiction of the State Court at this time and in this Court.

In view of the above, it is the position of the appellee that all matters pertaining to the trial and judgment of the Third Party Claim must be considered *res adjudicata.*

II.

The second of appellant's Specification of Errors is that:

> 2. "The trial court erred in denying appellant's motion for a judgment of nonsuit." (App. Op. Br. pp. 3-7.)

(a) Since the judgment of the State Court declared that the appellee was the owner of and entitled to possession of the said motor grader, the Court properly denied appellants' motion for nonsuit, as title and right to possession was *res adjudicata,* as aforesaid. The appellee's introduction to evidence of the judgment and the file of the case in

the State Court was sufficient to establish the appellee's *prima facie* case. [Tr. pp. 36-37.]

(b) Appellants contend that appellee failed to allege ownership and right of possession to the motor grader in appellee's complaint filed in the United States District Court. Paragraph VII of appellee's complaint adequately alleges those facts. [Tr. p. 5.] Furthermore, appellants should not be allowed to attack the sufficiency of the appellee's complaint at this stage of the case, since the appellants did not see fit to object to the same either before or during trial.

III.

Appellants contend in their Third Specification of Errors:

> 3. "Damages awarded were erroneously allowed and were also excessive.
>
> "(a) Measure of damages for wrongful garnishment is limited to expense of recovering motor grader." (App. Op. Br. pp. 3 and 7.)

(a) Appellants contend that the damages awarded by the United States District Court should have been limited to the expense of the return of the motor grader with interest; the recovery of the chattel being received in mitigation of damages. It is evident that the appellants, throughout all of these proceedings, insist on labeling this action as one for damages for wrongful levy of process. However, it has been appellee's position from the filing of the complaint in the United States District Court [Tr. p. 3], and throughout the proceedings of this case, and

from the evidence on which the Court based its Findings of Fact and Conclusions of Law and Judgment [Tr. pp. 24-34, incl.] that the cause of action for which the appellee seeks redress from appellants is one of TRESPASS. This matter will be forcefully discussed by appellee in its own argument. Therefore any limitation of damages as sought herein by appellants erroneously based on the theory of wrongful levy of process is not in point, as the action at bar is that of trespass, *i.e.,* the unauthorized interference with appellee's title and right to possession of the said motor grader.

The authorities cited by appellants, *i.e., Dorsey v. Marlow,* 14 Cal. 553 at 556; *Ross v. Sweeters,* 119 Cal. App. 716; *Blewett v. Miller,* 131 Cal. 149, are concerned with damages to personal property, either for conversion where there was a total loss, or for depreciation of, or damage to the chattel itself; *i.e.,* horses were lost, cows lost weight, cherries became overripe, etc., but not for loss of use as in our case. The appellee has no quarrel with the principles of law enunciated by those cases, but since appellee's claim for damages is not based on that type of damage, those cases do not apply. Rather, the following authorities which are concerned with damages for loss of use are applicable.

In the case of *Meyers v. Bradford,* 54 Cal. App. 157 at 160, the Court states:

> "The only difficulty is in determining the financial measure of the use of the machine; in other words, how much money would compensate for the loss of its

> use during the time it was being repaired. If the plaintiff had hired another machine, what he paid for it, if the rental value, would furnish a practicable and reasonable measure of his loss. But he suffers an equal detriment if he chooses to do without a machine while his is being repaired, and there seems to be no sound reason why the rental value of such machine should not be taken in either case as a fair measure of his loss."

(b) The appellants contend that since appellee did not establish by the evidence that the motor grader could have been used in the county of Los Angeles during the period of detention, the appellee is not entitled to recover damages for loss of use of the motor grader. This is not supported by the authorities in this jurisdiction as is shown in the case of *Meyers v. Bradford, supra.*

(c) Appellant's claim that appellee did not act with diligence to protect its own interest in seeking the recovery of its motor grader at the earliest possible time. This is not supported by the evidence and the findings of the trial court. The appellee did not have possession or control of the motor grader after the attachment and subsequent restraining order; and as such, was not in a position to mitigate the damages. The authorities support this statement, in that they require that the injured party does some act which approximately contributes to the damage. The case of *Valencia v. Shell Oil Co.,* 23 Cal. 2d 840 at 846, 847, holds that:

> "The essence of the rule denying recovery for losses which could have been prevented by the reasonable

efforts and expenditures of plaintiff is that his conduct rather than that of defendant approximately caused said losses."

Once the wrongful act of trespass was committed by the appellants the act causing the damages was complete; and appellants must be held responsible for all the damages flowing from that wrongful act. The fact that the legal process, *i.e.,* Third Party Claim, required a definite length of time to resolve the question of title and possession, was solely due to the court procedure set in motion by the appellants' wrongful act of trespass. In no way was this damage contributed to by any acts of the appellee. This was found to be so by the United States District Court and its finding on this matter should not be disturbed, unless appellants can show a clear abuse of discretion on the part of said Court.

IV.

(a) Appellants contend that appellee is not entitled to damages for loss of the use of the motor grader from the time the restraining order was granted, to-wit, May 10, 1949, because the appellee did not ask the State Court to require an undertaking on the part of the appellants in support of the injunction order.

It is again necessary to reiterate that the appellee's action in the District Court of the United States is one for damages arising out of trespass. In trespass the elements of malice, ill will, and probable cause are immaterial and not in point. The issue is solely that of unjustified inter-

ference with the right of possession. The authorities are clear in their distinction between an action founded on trespass and that for damages for the wrongful use of process. In the case of *McPheeters v. Bateman,* 11 Cal. App. 2d 106, the defendant levied upon property which did not belong to the judgment debtor. At page 109 of said case the Court held as follows:

> "Where an execution is levied upon property which does not belong to the judgment debtor the owner of the property is entitled to recover from those responsible for the levy, such as damage as he may have suffered by reason of the levy, and any further proceedings taken thereunder. He sues for trespass to the property and not for malicious prosecution, unless he also seeks to charge the wrongdoer with exemplary damages."

The appellants by obtaining the restraining order committed an act of trespass in wrongfully interfering with the lawful possession of the motor grader. In fact, therefore, from February 25, 1949, to May 10, 1949, the appellants deprived appellee of the rightful possession of the motor grader by means of the writ of attachment; and from May 10, 1949, until judgment was had in the Third Party Claim, the appellants deprived appellee of its right to possession to said chattel by means of the restraining order sought for and obtained by appellants. Again, appellee wishes to make clear its position, that also in the matter of the restraining order the appellee was still not a party to the suit, between appellant and debtor. The rule requiring an undertaking might apply to the debtor

in the first instance, *i.e.,* in the State Court action between the appellants and Julio A. Villaseñor, but could not apply to an innocent third party, appellee, who was damaged by appellants' act of trespass, *i.e.,* the restraining order obtained by the appellants herein.

In any event it would seem to appellee that the reason the law gives the right to a restrained party to require an undertaking is to afford the party restrained the protection in dealing with a financially responsible party who is able to respond in damages. The appellee fails to find authority to support appellants' contention that makes it a prerequisite to liability that an undertaking be requested by the restrained party, when that party is an innocent third party and is not involved in any way in the litigation between the debtor and the creditor in the main action, *i.e.,* the case of appellants against Villaseñor.

The appellants cite the case of *Lembert v. Haskell,* 80 Cal. 611, 616, 22 Pac. 327, as authority for appellants' contention that appellee was duty bound to ask for an undertaking before appellants can be held responsible for the damage arising out of and caused by the restraining order. That case does not support appellants' contention, for it seems to be concerned with the *court's power* to require a sufficient undertaking upon motion by the party restrained. In no way can appellee find in this case any support for appellants' contention that an undertaking is a necessary prerequisite before the injured party can sue in damages arising out of the unauthorized interference with the possession of the chattel.

APPELLEE'S ARGUMENT.

I.
Liability.

The appellee's action in the United States District Court is based on the cause of action of trespass to personal property. An interference with the possession or physical condition of the personal property in the possession of another, without justification, is a trespass.

In the case of *McPheeters v. Bateman,* 11 Cal. App. 2d 106, cited *supra,* the defendant levied upon property which did not belong to the judgment debtor. The plaintiff, the owner of the restaurant business which was levied upon by defendant, now sues for trespass to the property and for damages resulting therefrom. This case clearly holds that the defendant is liable for damages if he interferes with the possession of plaintiff's personal property by a writ of execution, and by anology it should apply to the garnishment and restraining order in the instant case. The action is the old common law action of trespass. The question of malice or of probable cause is not involved in an action of trespass; as the case of *McPheeters v. Bateman, supra,* also hold that where the evidence showed that the instructions to the constable were sufficient to authorize him to take possession of all the personal property belonging to the restaurant business of plaintiff, the damages sustained by reason of loss of such property were reasonable, as were plaintiff's loss of profits while the business was closed, even though the levy was made upon sufficient cause and without malice.

The case of *Rider v. Edgar,* 54 Cal. 127, holds that to maintain trover or trespass *de bonis asportatis,* evidence of an actual forcible dispossession of the plaintiff is not

necessary. Any unlawful interference with the property, or exercise of dominion over it, by which the owner is damnified, is sufficient to maintain either action. It was held that in an action by a mortgagee of personal property against a sheriff, for taking the same under attachment, that a levy upon a part of the property in the possession of the mortgagor, and the appointment of a keeper, was a taking, although the property was not moved or otherwise disturbed, and though it was released before any demand from plaintiff therein.

II.
Damages.

As a guide to the Court in assessing damages the appellee submits the following cases which indicate the trend of the Court's views on wrongful detention of machinery or equipment.

Ferris v. Cooper, 125 Cal. App. 234, awarding two-thirds of the value of the machinery detained as not being excessive.

Dunlop v. Farmer, 64 Cal. App. 691, awarding one-half of the value of the automobile detained as not being excessive.

Restatement of Torts, Section 931, Subsection (a), in substance holds that the compensable damages to the owner of a chattel is the value of the use of the chattel or rental value of a substitute.

Cal. Civ. Code, Sec. 3333;

Zvolanek v. Bodger Seeds, Ltd., 5 Cal. App. 2d 106 at 108.

"Damages are either general or special. Damages which necessarily result from the act complained of are denominated general damages, and may be proved under the *ad damnum* clause or general allegation of damage; while those which are the natural consequence of the act complained of, and not the necessary result of it, are termed special damages. Special damages must be specially set forth in the complaint or the plaintiff will not be permitted to give evidence of it at the trial . . . The measure of damages arising from tort, such as the one herein pleaded, is the amount which will compensate for all detriment proximately caused thereby whether it could be anticipated or not." (Civ. Code, Sec. 3333.)

California Code of Civil Procedure, Section 667, provides for damages to be awarded for detention of chattel.

Respectfully submitted,

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